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18 UNITED STATES OF AMERICA

19 UNITED STATES DISTRICT COURT

20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

21 UNITED STATES OF AMERICA,

22 CR No. 15-621-R-3

23 Plaintiff,

24 v.
GOVERNMENT'S SENTENCING POSITION
FOR DEFENDANT ARSEN TERZYAN;
DECLARATION OF SPECIAL AGENT DAVID
REYNOLDS

25 ARSEN TERZYAN,

26 Defendant.

27 Sentencing Date: 6/20/2016
Sentencing Time: 10:00 a.m.
Location: Courtroom of the
Hon. Manuel L. Real

28 Plaintiff United States of America, by and through its counsel
of record, the United States Attorney for the Central District of
California and Assistant United States Attorneys Julius J. Nam and
Saurish Appleby-Bhattacharjee, hereby files its sentencing position
for defendant ARSEN TERZYAN. The government's sentencing position is
based upon the attached memorandum of points and authorities, the
files and records in this case, the Presentence Investigation Report
submitted by the United States Probation Office, the declaration of

1 United States Secret Service Special Agent David Reynolds and its
2 attached exhibits, and any other evidence or argument that the Court
3 may wish to consider at the time of sentencing. The government
4 respectfully requests the opportunity to supplement its position or
5 respond to defendant as may become necessary.

6

7 Dated: June 6, 2016

Respectfully submitted,

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12 /s/ Saurish Appleby-Battacharjee
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 7, 2016, defendant Arsen Terzyan ("defendant") pleaded guilty to Counts One, Eighteen, and Nineteen of the twenty-count indictment in United States v. Daniyelyan, et al., CR 15-621-R, which charge defendant, respectively, with conspiracy to possess fifteen or more unauthorized access devices, in violation of 18 U.S.C. § 1029(b)(2); possession of fifteen or more unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3); and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). (Dkt. No. 172; see also Dkt. No. 236 (accepting defendant's guilty pleas).) The underlying facts of defendant's offenses, as set forth in the plea agreement and the PSR, are not disputed by either party. The government concurs with the PSR's calculation of defendant's total offense level and criminal history category. For the reasons set forth below, the government recommends a sentence of 54 months' imprisonment, a two-year term of supervised release, a fine in the amount of \$6,000, and a special assessment of \$300.

II. THE PRESENTENCE INVESTIGATION REPORT

On April 26, 2016, the United States Probation Office ("USPO") filed its Presentence Investigation Report ("PSR") in this matter. (Dkt. No. 248.) The USPO determined that: defendant's United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") base offense level is 6 under U.S.S.G. § 2B1.1(a) and that he is subject to a 12-level enhancement for loss of more than \$250,000 but less than \$550,000 under U.S.S.G. § 2B1.1(b)(1)(G); a 2-level enhancement for 10 or more victims under § 2B1.1(b)(2)(A); and another 2-level enhancement under § 2B1.1(b)(11)(A) for use of device-making equipment. (PSR ¶¶ 25-

1 35.) After assessing defendant's role in the instant conspiracy, the
 2 USPO determined that he was "deeply involved in multiple aspects of
 3 this offense and integral to the completion of the offense[.]" (Id.
 4 ¶ 33.) The USPO accordingly did not apply any mitigating role
 5 adjustment. (Id.) And upon accounting for defendant's acceptance of
 6 responsibility, the USPO reached a total offense level of 19. (Id.
 7 ¶ 39.) Defendant has a criminal history score of 0, placing him in
 8 criminal history category I. (Id. ¶¶ 44-45.)

9 Thus, the USPO identified the pertinent Guidelines imprisonment
 10 range, including the mandatory consecutive two-year sentence for
 11 defendant's aggravated identity theft conviction on Count Nineteen,
 12 to be 54 to 61 months. (Id. ¶ 73.) The USPO also found the
 13 applicable Guidelines range for a supervised release term to be 1 to
 14 3 years. (Id. ¶ 75.) Further, the USPO identified the applicable
 15 Guidelines range for a fine as \$6,000 to \$60,000 pursuant to U.S.S.G.
 16 §§ 5E1.2(c)(3) and 5E1.2(h)(1), and indicated both that defendant
 17 would be able to pay a fine of \$2,000 immediately, with monthly
 18 payments of at least \$114 to follow. (Id. ¶¶ 69-70, 82.) The USPO
 19 did not identify any restitution amount or victims to which
 20 restitution is due. (Id. ¶¶ 84-87.) The USPO also did not identify
 21 any grounds for a departure or a variance. (Id. ¶¶ 90-91.) Nor has
 22 the USPO disclosed its sentencing recommendation to the parties.

23 **III. APPLICABLE SENTENCING GUIDELINES AND STATUTORY MINIMUM SENTENCE**

24 Defendant and the government have not reached any agreement on
 25 applicable Sentencing Guidelines factors. (See Plea Agmt., ¶ 17.)
 26 With just one exception concerning the USPO's rationale for applying
 27 a 2-level enhancement under U.S.S.G. § 2B1.1(b)(11), the government
 28

1 concurs with the Sentencing Guidelines factors that the USPO has
2 deemed applicable to defendant's conduct here.

3 **A. Base Offense Level (U.S.S.G. § 2B1.1(a))**

4 The USPO correctly notes (see PSR ¶ 25) that as to defendant's
5 convictions on Counts One and Eighteen for violations of 18 U.S.C.
6 § 1029, the Sentencing Guidelines prescribe a base offense level of
7 6. U.S.S.G. § 2B1.1(a)(2); see also id., App'x A at 553 (specifying
8 applicable Guidelines section for offenses under 18 U.S.C. § 1029).

9 **B. Intended Loss Amount of Between \$250,000 and \$550,000**

10 **(U.S.S.G. § 2B1.1(b)(1)(G))**

11 Under U.S.S.G. § 2B1.1(b)(1), defendant's offense level is
12 subject to incremental enhancements if the loss amount attributable
13 to him exceeds \$6,500. (See PSR ¶ 26.) Here, the USPO concluded:

14 [T]he reasonable amount of loss attributable to Terzyan
15 for his conduct is between \$250,000 and \$550,000. This
16 amount is derived from multiplying the number of access
17 devices found on [skimmers that had been installed at]
18 gas stations [by members of the conspiracy] beginning on
19 July 30, 2014, (464), and the number of access devices
20 found at Terzyan's home on the date of his arrest (78)
21 by \$500, which totals \$271,000.

22 (Id. ¶ 28.) The USPO's determination in this regard is amply
23 supported by the factual basis in the parties' plea agreement, and
24 the declaration of United States Secret Service ("USSS") Special
25 Agent ("SA") David Reynolds attached hereto ("Reynolds Decl.").
26

27 As the USPO correctly noted, defendant, along with his cohort of
28 co-conspirators, traveled to multiple gas stations in Southern
California, on two different dates, to assist in installing skimmers
at the point-of-sale terminals of gas pumps. (Plea Agmt. ¶ 15; PSR
¶¶ 9-17.) What is more, defendant knew that information gathered
through these skimmers would be encoded on blank access devices and

1 used by members of the conspiracy to make fraudulent purchases
 2 without authorization. (Plea Agmt. ¶ 15; PSR ¶¶ 13-17.) His conduct
 3 in this regard shows that he was "deeply involved in multiple aspects
 4 of this offense and integral to the completion of the offense[.]"
 5 (PSR ¶ 33.)

6 In the course of investigating this conspiracy, the USSS and
 7 other law enforcement agencies successfully recovered a number of
 8 skimmers that had been installed on different dates at different gas
 9 stations by members of the conspiracy. (Reynolds Decl. ¶ 2.) Many
 10 of these skimmers were forensically analyzed by the USSS to determine
 11 how many access devices, if any, were stored on each. (Id.) SA
 12 Reynolds compiled a spreadsheet tracking, among other things, the
 13 date and location from which each skimmer was collected, and the
 14 number of access devices that were stored on each skimmer before it
 15 was recovered by law enforcement. (Id. ¶ 3, Ex. 1.) This
 16 spreadsheet shows that nearly 1,000 unauthorized access devices were
 17 stored on just the subset of skimmers that had been examined
 18 forensically by the USSS. (Id.)

19 Defendant, for his part, was first observed entering the
 20 conspiracy on July 30, 2014, when he and other members of the
 21 conspiracy traveled to three gas stations in Los Angeles and Santa
 22 Monica, where they installed skimmers at a point-of-sale terminal at
 23 each gas station in order to steal unsuspecting customers' credit and
 24 debit card numbers. (Plea Agmt. ¶ 15; PSR ¶ 13.) On April 9, 2015,
 25 he again assisted his co-conspirators in a skimmer installation at a
 26 Beverly Hills gas station. (Plea Agmt. ¶ 15; PSR ¶ 14.) And on
 27 October 21, 2015, he possessed at least 78 real credit and debit card
 28 numbers, which he knew belonged to real individuals, on a USB flash

1 drive in a safe at his residence. (Plea Agmt. ¶ 15; PSR ¶ 16.) The
2 only facts in the record establish that defendant remained a member
3 of the conspiracy during this entire period from July 2014 through
4 October 2015.

5 As set forth in U.S.S.G. § 1B1.3(a)(1)(B)(iii), "in the case of
6 a jointly undertaken criminal activity (a criminal plan, scheme,
7 endeavor, or enterprise undertaken by the defendant in concert with
8 others, whether or not charged as a conspiracy), all acts and
9 omissions of others that were . . . reasonably foreseeable in
10 connection with that criminal activity" constitute relevant conduct
11 that may be considered in determining defendant's specific offense
12 characteristics. A total of 464 access devices were found stored on
13 the skimmers installed by defendant and other members of the
14 conspiracy between July 30, 2014 and the conspiracy's end in October
15 2015. (Reynolds Decl. ¶ 3, Ex. 1.) Adding to this number the 78
16 access devices found in defendant's home (Plea Agmt. ¶ 15; PSR ¶ 16),
17 defendant is rightfully attributed a loss amount corresponding to the
18 542 total access devices associated with his tenure as an observed
19 member of the conspiracy. Multiplying this total number by \$500 per
20 access device, as is mandated by the Guidelines, the intended loss
21 amount attributable to defendant is \$271,000. See U.S.S.G. § 2B1.1,
22 cmt. n.3(F)(i) ("In a case involving any counterfeit access device or
23 unauthorized access device, loss includes any unauthorized charges
24 made with the counterfeit access device or unauthorized access device
25 and shall not be less than \$500 per access device."). Defendant's
26 intended loss thus falls within the 12-level enhancement set forth in
27 U.S.S.G. § 2B1.1(b)(1)(G).

1 **C. 10 or More Victims (U.S.S.G. § 2B1.1(b)(2)(A))**

2 The USPO determined that a 2-level enhancement for 10 or more
 3 victims was appropriate based on a representation by the
 4 government that "there are more than 10 victim financial
 5 institutions as a result of this offense." (PSR ¶ 29.) The
 6 government's representation in this regard is well supported by SA
 7 Reynolds' declaration.

8 As discussed previously, a forensic examination found nearly
 9 1,000 unauthorized access devices stored on just a subset of the
 10 skimmers that had been installed by members of the conspiracy.
 11 (Reynolds Decl. ¶ 3, Ex. 1.) Additional access devices were found
 12 on electronics and digital media seized from the homes of
 13 defendant and his co-conspirators. (*Id.* ¶ 4; *see also* PSR ¶¶ 16-
 14 17.) The USSS submitted these access devices to different credit
 15 card companies, including Visa, so that these companies could, in
 16 turn, determine whether the stolen credit and debit card numbers:
 17 (1) belonged to real persons; and (2) had been used to make
 18 fraudulent purchases. (Reynolds Decl. ¶ 4.) SA Reynolds submits,
 19 with his declaration, a spreadsheet totaling the losses incurred,
 20 as reported by Visa, from fraudulent use of the access devices
 21 that the USSS had submitted to Visa for analysis. (*Id.* ¶ 5, Ex.
 22 2.) This spreadsheet shows more than 10 financial institutions
 23 incurred financial losses as a result of fraudulent use of those
 24 access devices. (*See id.*)

25 **D. Trafficking of Unauthorized Access Devices (U.S.S.G.
 26 § 2B1.1(B)(11))**

27 The USPO notes that a "2-level increase is appropriate for
 28 trafficking of unauthorized access devices" and that "the Government

1 has indicated that it intends to seek the enhancement." (PSR ¶ 31.)
2 The USPO also states, however, that under U.S.S.G. § 2B1.1(b)(11), "a
3 2-level increase for the possession of device making equipment is
4 more appropriate for the facts in this case," where the USPO did not
5 see "evidence establishing that the defendants trafficked in access
6 devices," even though defendant admitted that "on October 21, 2015,
7 access device-making equipment, including a computer connected to a
8 magnetic card reader and writer, was found at a co-conspirator's
9 residence," which "was to be used for the purpose of creating
10 counterfeit and unauthorized access devices using the real credit
11 card and debit card numbers that [defendant] and other members of the
12 conspiracy stole from gas station customers using the skimming
13 devices." (PSR ¶¶ 17, 30-31.) As § 2B1.1(b)(11) provides for a
14 single 2-level enhancement based on multiple rationales - two of
15 which are possession of device-making equipment and trafficking of
16 unauthorized access devices - the USPO acknowledged that the two
17 "alternative enhancements under the same section . . . have the same
18 effect on the offense level," and "[t]he distinction between
19 possession and trafficking may be, in this case, more a matter of
20 characterization than of substance." (Id. ¶ 31.)

21 While the government agrees with the PSR that a 2-level
22 enhancement for possession of device-making equipment could apply to
23 defendant in light of his participation in a conspiracy that included
24 possession and use of equipment to manufacture access devices, the
25 government disagrees with the USPO's apparent analysis that evidence
26 of trafficking is required for the related enhancement to apply under
27 § 2B1.1(b)(11).

1 Pursuant to 18 U.S.C. § 1029(e), "traffic" means "transfer, or
2 otherwise dispose of, to another, or obtain control of with intent to
3 transfer or dispose of." 18 U.S.C. § 1029(e)(5). Moreover, as
4 stated above, U.S.S.G. § 1B1.3(a)(1)(B)(iii) delineates the scope of
5 relevant conduct that may be considered in determining defendant's
6 specific offense characteristics.

7 Here, as the parties have stipulated in the plea agreement,
8 "[d]efendant and his co-conspirators had access to the real credit
9 and debit card numbers stored on the skimming devices installed in
10 the point-of-sale terminals, and knew that these stolen credit and
11 debit card numbers would be used, without authorization, to make
12 fraudulent purchases." (Plea Agmt. ¶ 15; PSR ¶ 15.) For the credit
13 and debit card numbers that defendant helped steal to be used to make
14 fraudulent purchases, it was reasonably foreseeable that transfer, or
15 trafficking, of the card numbers would need to take place, and ample
16 evidence in this case demonstrated that stolen credit and debit card
17 numbers were used to make fraudulent purchases such that there were
18 at least ten victim financial entities. (PSR ¶ 29; Reynolds Decl.
19 ¶ 5, Ex. 2.) Accordingly, while both the possession of access
20 device-making equipment and the trafficking of unauthorized access
21 devices that were part of - and reasonably foreseeable in - the
22 instant conspiracy offense equally warrant a 2-level enhancement
23 under § 2B1.1(b)(11), the government asks the Court to apply the
24 trafficking enhancement on these facts.

25 **IV. GOVERNMENT'S SENTENCING RECOMMENDATION**

26 Setting aside the USPO's rationale for application of the
27 § 2B1.1(b)(11) enhancement, the government otherwise agrees with all
28 sentencing calculations in the PSR, and recommends a low-end term of

1 54 months' imprisonment, a two-year term of supervised release, a
2 fine in the amount of \$6,000, and a special assessment of \$300. This
3 sentence is sufficient, but not greater than necessary, to meet the
4 sentencing goals set forth in 18 U.S.C. § 3553(a).

5 **A. 18 U.S.C. § 3553(a)(1)**

6 Under 18 U.S.C. § 3553(a)(1), the Court must consider "the
7 nature and circumstances of the offense and the history and
8 characteristics of the defendant" in imposing a sentence. Defendant
9 has pleaded guilty to a conspiracy to install skimming devices at gas
10 station pumps throughout Southern California and Las Vegas with the
11 goal of stealing ATM, credit, and debit card numbers and associated
12 customer information from unsuspecting gas station customers, knowing
13 that the stolen information would be used to make fraudulent
14 purchases. (PSR ¶¶ 9-15.) This offense resulted in the theft of
15 more than 2,000 credit and debit card numbers over the period of at
16 least two-and-a-half years. Specifically, defendant participated in
17 this conspiracy for at least fourteen months during which at least
18 464 credit and debit card numbers were stolen, and he had an
19 additional 78 unauthorized access devices in his home, leading to an
20 intended loss amount of \$271,000, pursuant to U.S.S.G. § 2B1.1(b)(1),
21 Application Note 3(F), as detailed above. The government's
22 recommended sentence justly reflects the seriousness of defendant's
23 offense, which was committed with disregard for other people's
24 property and for a fraudulent purpose. Taking into consideration
25 defendant's acceptance of responsibility for his role and
26 participation in the offense, his relatively light criminal history,
27 and his apparently positive character and conduct as attested to by
28 members of his community (id. ¶¶ 53, 57), the government's

1 recommended custodial sentence of 54 months at the low end of the
2 guideline range is appropriate and just.

3 **B. 18 U.S.C. § 3553(a)(2)**

4 Under 18 U.S.C. § 3553(a)(2), the Court must consider "the need
5 for the sentence imposed: (A) to reflect the seriousness of the
6 offense, to promote respect for the law, and to provide just
7 punishment for the offense; (B) to afford adequate deterrence to
8 criminal conduct; (C) to protect the public from further crimes of
9 the defendant; and (D) to provide the defendant with needed
10 educational or vocational training, medical care, or other
11 correctional treatment in the most effective manner."

12 A sentence of 54 months will serve to protect the community from
13 further crimes by defendant, afford adequate specific and general
14 deterrence, and promote respect for the law.

15 **C. 18 U.S.C. § 3553(a)(3)-(7)**

16 Under 18 U.S.C. § 3553(a)(3)-(7), the Court must consider "the
17 kinds of sentences available," "the kinds of sentence and the
18 sentencing range established," "any pertinent policy statement," "the
19 need to avoid unwarranted sentence disparities among defendants with
20 similar records who have been found guilty of similar conduct," and
21 "the need to provide restitution to any victims of the offense." The
22 government's recommended sentence serves these statutory objectives,
23 where – notwithstanding his mandatory 2-year imprisonment on Count
24 Nineteen – defendant's criminal history (category I) and total
25 offense level (level 19) place him in Zone D and, thus, outside the
26 possibility of a within-Guidelines sentence that would include only a
27 probationary term. U.S.S.G. § 5B1.1, cmt. n.2. Moreover, in the
28 absence of any significant mitigating factors that warrant departures

1 or variances, a within-Guidelines sentence also is not likely to
2 result in unwarranted sentencing disparities. (PSR ¶¶ 105-106.)

3 As for the fine, defendant has a significant net worth and a
4 substantial monthly income, with a positive monthly cash flow even
5 after accounting for expenses and liabilities. (Id. ¶ 67.) He is
6 thus able to pay at least a low-end fine of \$6,000, as determined
7 pursuant to U.S.S.G. §§ 5E1.2(c)(3) and 5E1.2(h)(1).¹ (Id. ¶¶ 69-70,
8 82.) The government thus asks the Court to impose a fine of \$6,000,
9 with \$2,000 to be paid immediately, and the remainder to be paid in
10 monthly installments of at least \$114, as recommended by the USPO.
11 (Id. ¶¶ 69-70.)

12 Lastly, with respect to restitution in this case, the government
13 has identified actual financial losses sustained by victim financial
14 institutions and may separately be seeking restitution from each
15 defendant in this case through post-sentencing restitution
16 proceedings as provided for in U.S.S.G. § 5E1.1. Because the
17 government is continuing to gather information for purposes of
18 restitution, the government respectfully requests that the Court
19 schedule a deferred restitution hearing pursuant to 18 U.S.C.
20 § 3664(d)(5), within ninety days from the date of defendant's
21 sentencing.

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23 ///

24 ///

25 ¹ Pursuant to U.S.S.G. § 5E1.2(h)(1), the applicable fine range
26 for offenses committed prior to November 1, 2015 is determined by
27 using the Guidelines range in the version of § 5E1.2(c) that was in
28 effect on November 1, 2014. As defendant committed the offenses of
conviction before November 1, 2015, the applicable range is \$6,000 to
\$60,000. See U.S.S.G. § 5E1.2(c) (2014).

1 **V. CONCLUSION**

2 The government respectfully recommends a sentence of 54 months'
3 imprisonment, a two-year period of supervised release, a mandatory
4 special assessment of \$300, and a fine of \$6,000, with \$2,000 to be
5 paid immediately, and the remainder to be paid in monthly
6 installments of at least \$114.

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